Supreme Court, U.S.
FILED
SEP 6 1991
OFFICE OF THE CLERK

No. 91-202

In The

Supreme Court of the United States

RICHARD H. LAUGHINGHOUSE,

Petitioner,

v.

STATE OF NORTH CAROLINA, EX REL.,
NORTH CAROLINA PORTS RAILWAY COMMISSION,

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of North Carolina

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

DOES THE FELA PREEMPT NORTH CAROLINA GENERAL STATUTES §62-242 THEREBY BARRING THE PLAINTIFF'S CLAIM FOR RELIEF UNDER NORTH CAROLINA GENERAL STATUTES §62-242?

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Respondent respectfully submits that a writ of certiorari to review the judgment and opinion of the North Carolina Supreme Court in Laughinghouse v. State of North Carolina, is unnecessary and should not issue.

STATEMENT OF THE CASE AND FACTS

On January 31, 1985, the Petitioner alleged that he was injured in the course of his employment with the North Carolina Ports Railway Commission. Petitioner testified at the hearing before Commissioner Pearson of the North Carolina Industrial Commission that he attempted

to engage a pit switch when his right foot slipped off the switch causing him to fall over. At that time the Petitioner was engaged in transporting lumber imported from the Soviet Union. The switch, with which the Petitioner alleges to have hurt himself, was owned, maintained and operated by the North Carolina State Ports Authority.

On June 3, 1987, the Petitioner brought suit against the Respondent, the North Carolina Ports Railway Commission, under the Federal Employers Liability Act, 45 U.S.C. 51 *et seq.* (FELA) in the United States District Court for the Eastern District of North Carolina. Thereafter, the Respondent answered the Complaint and subsequently moved the Court to dismiss the Petitioner's FELA claim on the grounds of lack of subject matter jurisdiction. The U. S. District Court granted the Respondent's Motion in reliance upon *Welch v. Texas Dept. of Highways and Public Transportation*, 483 U.S. 468 (1987), in part, overruled the decision of *Parden v. Terminal Ry. of Alabama State Docks Dept.*, 377 U.S. 184 (1964) on the grounds that although Congress could have waived a state's United States Constitution Eleventh Amendment immunity to suits brought under the FELA in federal court, Congress had not done so specifically in enacting the FELA thereby allowing the Respondent immunity to suits brought against states and state agencies in federal court pursuant to the Eleventh Amendment.

The Petitioner thereafter filed an affidavit under the North Carolina State Tort Claims Act with the North Carolina Industrial Commission on January 29, 1988. The Respondent answered alleging, among other defenses, lack of subject matter jurisdiction. The Petitioner's claim was based on N.C. Gen. Stat. §62-242 which provides a

cause of action by a railroad employee against his employer much like the remedies provided under the FELA. The North Carolina Industrial Commission is vested with the jurisdiction to hear state tort claim cases and the Petitioner's claim was heard before then Chairman of the Industrial Commission, Ernest C. Pearson, on August 8, 1988. Chairman Pearson issued his decision on December 20, 1988. He denied the Petitioner's claim finding that the Industrial Commission had jurisdiction to hear the case but that the employee and specific state agency named in the affidavit were not negligent. Thereafter, the Petitioner gave notice of his appeal to the full Industrial Commission.

After being briefed and argued, the full Commission issued its decision and order on January 4, 1990, affirming the dismissal.

The Petitioner appealed the decision of the full Commission to the North Carolina Court of Appeals which affirmed the dismissal of the Plaintiff's affidavit on January 15, 1991. The North Carolina Court of Appeals found that the North Carolina Industrial Commission erred in failing to dismiss the Plaintiff's claim because it lacked subject matter jurisdiction. The North Carolina Court of Appeals found that the Petitioner was involved in interstate commerce when he was injured on January 31, 1985, and therefore his claim for relief under N.C. Gen. Stat. §62-242 was preempted by the FELA. The North Carolina Industrial Commission does not have jurisdiction of cases brought under Federal Law.

On February 15, 1991, the Petitioner petitioned the Supreme Court of North Carolina for discretionary

review under N.C. Gen. Stat. §7A-31. The Petitioner's petition for discretionary review before the Supreme Court of North Carolina was denied on May 6, 1991.

REASONS FOR DENYING CERTIORARI

I. THE NORTH CAROLINA COURT OF APPEALS AND SUPREME COURT PROPERLY DISMISSED THE PETITIONER'S CLAIM ON THE BASIS OF THE FEDERAL PREEMPTION DOCTRINE.

In 1887 North Carolina adopted North Carolina General Statutes §62-242 to provide railway employees a negligence based cause of action against their employers which operate within the state. In 1908, the Congress enacted the second Employer's Liability Act (FELA) to provide an adequate national law covering injuries sustained by railway employees which were the result of negligence of their employers. The FELA was *"intended to be very comprehensive, to withdraw all injuries to railway employees in interstate commerce from the operations of the varying state laws, and to apply them a national law having a uniform operation through all the states"*, *New York Central Ry. Co. v. Winfield*, 244 U.S. 147, 150 (1917) (emphasis added). The *Winfield* Court went on to cite from the legislative history of the enacted bill and found, in HR REP. NO. 1386, 60th Cong., 1st Sess., that the bill was " 'intended in its scope to cover all commerce to which the regulative powers of Congress extends . . . by this bill it is hoped to fix a uniform rule of liability throughout the Union with the reference to the liability of common carriers to their employees. . . . A federal statute of this

character will supplant numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the Union and the legal status of such employer's liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all the states.' " *Id*. The *Winfield* Court went on to find "[i]t is settled that under the commerce clause of the Constitution, Congress may regulate the obligation of common carriers and the rights of their employees arising out of injuries sustained by the latter where both are engaged in interstate commerce; and it is also settled that when Congress acts upon the subject, all state laws covering the same field are necessarily superseded by reasons of supremacy of the national authority." *Id* at 148.

The Petitioner bemoans the use of the Federal Preemption Doctrine as a shield to liability and claims that Congress and the Courts did not intend for such a result. However, the use of federal preemption as a shield from state law liability has a long history and this is precisely what happened in *Winfield*. James Winfield, the employee, attempted to recover under New York Workman's Compensation since there was no actionable negligence on the part of the employer. The *Winfield* Court held that the employee's only remedy was under the FELA and was barred from receiving benefits under Workman's Compensation. Winfield argued that the New York Workman's Compensation Law was not repugnant to the FELA and that the two acts could stand together. The *Winfield* Court rejected Winfield's agreement and found that the New York law was in conflict with the FELA and denied the employee recovery under the Federal Preemption Doctrine.

The Petitioner in this case also argues that N.C. Gen. Stat. §62-242 is not repugnant to the FELA despite the fact that N.C. Gen. Stat. §62-242 provides a negligence based cause of action by a railroad employee against his employer and takes the position that the Federal Preemption Doctrine alternates between the per se preemption and cooperative federalism depending upon the composition of the Supreme Court bench. "Few points of law are more clearly settled by Supreme Court decisions than the matter of interrelationships of the FELA and state law. In rulings dating from the enactment of the federal statute, it has invariably been stated that the FELA supercedes state law in so far as the two cover the same field. This is said to result inevitably from Congress: exclusive power to regulate interstate commerce; that the laws of the states were regarded as determinative of employers' liability to employees engaged in interstate commerce prior to the passage of the act was only because Congress, although empowered to regulate the subject, had not acted thereon, and because the subject was one which fell within the police powers of the state in the absence of congressional action." Annot. 97 L.Ed. 403, 404 (footnotes omitted). The Petitioner would have the Court construe FELA preemption of state law under a cooperative federalism theory and ignore 74 years of settled law. The Winfield holding of federal preemption over similar state laws has been cited in majority decisions of the United States Supreme Court at least 18 times.[1] The Petitioner

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[1] *New York Central and Hudson River R.R. Co. v. Tonsellito*, 244 U.S. 360 (1917), *Middleton v. Texas Power & Light*, 249 U.S. 152 (1919), *Mergenthaler Linotype Co., v. Davis*, 251 U.S. 256

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requests this Court to make an unprecedented departure from a long line of established law based on changes in the Supreme Court bench rather than the merits of his argument. The Petition should therefore be denied.

The Petition also claims that the rationale adopted in *Rogers v. Consolidated Rail Corp.*, 688 F. Supp. 835 (NDNY 1988) supports a deviation from the Federal Preemption Doctrine. The Petitioner's reliance on Rogers is misplaced. In *Rogers*, the Plaintiff did not have a FELA remedy at all and hence there could be no preemption. In contrast, Petitioner in this case has a legitimate FELA claim which cannot be heard in federal court because of the Eleventh Amendment according to *Welch*. Moreover, the Petitioner's FELA claim could be heard in the North Carolina General Courts of Justice except that the Petitioner's claim is against an agency of the state and under the North Carolina Torts Claim Act, N.C. Gen. Stat. §143-291 *et seq*. All claims against the state must be filed

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(1920), *United States v. Butt*, 254 U.S. 37 (1920), *Philadelphia & Reading Ry. v. Polk*, 256 U.S. 332 (1921), *Washington v. Dawson*, 264 U.S. 219 (1924), *New York Central R.R. Co., v. Chisholm*, 268 U.S. 29 (1925), *Missouri Pacific R.R. Co., v. Aeby*, 275 U.S. 426 (1928), *Northern Coal & Dock Co., v. Strand*, 278 U.S. 142 (1928), *International Shoe Co., v. Pinkus*, 278 U.S. 261 (1929), *Chesapeake & Ohio Ry. Co. v. Stapleton*, 279 U.S. 587 (1929), *Lindgren v. United States*, 281 U.S. 37 (1930), *Gilvary v. Cuyahoga Valley Ry. Co.*, 292 U.S. 57 (1934), *Cloverleaf Butler Co. v. Patterons*, 315 U.S. 148 (1942), *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947), *Collins v. American Buslines. Inc.*, 350 U.S. 528 (1956), *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), *Maryland v. Louisiana*, 451 U.S. 725 (1981)

with the North Carolina Industrial Commission. However, the North Carolina Industrial Commission is a court of limited jurisdiction and may only hear claims which arise in "accordance with the laws of North Carolina". The end result is that the Plaintiff has a valid FELA claim but does not have forum in which to hear his FELA claim. Consequently, the *Rogers* case has no applicability to the case at bar.

Federal and states courts have concurrent jurisdiction to hear a FELA claim, but nothing within the FELA "comport[s] to require state courts to entertain suits arising under it, but only to empower them to do so, so far as the authority of the United States is concerned . . . but there is nothing in the act of Congress that purports to force a duty upon such courts as against otherwise valid excuse." *Douglas v. New York NH and HR Company*, 279 U.S. 377, 378 (1929). "It is well settled that the Federal Employer's Liability Act, by making the jurisdiction of the Federal Court under the acts concurrent with that of the several states does not impose the duty upon a state court to exercise jurisdiction of a cause of action arising out of the act merely because the court has properly acquired jurisdiction of the person of the Defendant." 43 A.L.R. 2d 774.

II. THE PRESENT HOLDING OF THE CASE IS WARRANTED UNDER THE EXISTING LAW AND DOES NOT PRESENT AN IMPORTANT ISSUE FOR THE COURT'S DETERMINATION.

The petitioner would have this Court believe that a whole class of state railway and seaway employees are

affected by the present outcome of this case. The Petitioner's claim of a broad class of affected workers does not bear up to even the weakest scrutiny. The Petitioner and only the Petitioner is affected by the outcome of this case. In October, 1986, the North Carolina Ports Railway Commission ceased operating the railroad at the State Ports facilities in Wilmington and Morehead City. The operation of those railways were leased to a private company and the Commission has no employers engaged in the operation of the ports railways. Nor does this case affect state employees employed as seamen in that unlike the FELA, there is no North Carolina statute parallel to the Jones Act. Consequently, there are no state employees except the Petitioner, who could possibly have a claim under N.C. Gen. Stat. 62-242. The Petitioner's assertion of the broad effect of this case is baseless.

III. REGARDLESS OF THE EFFECT OF THE PREEMPTION DOCTRINE, THE PETITIONER'S CLAIM IS BARRED BY STATE LAW.

While the North Carolina Court of Appeals decided that the Industrial Commission did not have jurisdiction to hear this case on the grounds that the Petitioner's N.C. Gen. Stat. §62-242 claim was preempted by the FELA, the Court went on to find that the Industrial Commission properly dismissed the Petitioner's claim on state law grounds. Under well settled law in North Carolina, a state tort claims affidavit must name the specific state agency and state employee whose negligence proximately caused the injury. Failure to comply with N.C. Gen. Stat. § 143-297(2) by not naming the proper name of the department and employee is fatal and therefore such a

claim is subject to dismissal. See *Floyd v. Highway Commission*, 241 N.C. 461 (1955); *Woolard v. N.C. Dept. of Transportation*, 93 N.C. App. 214 (1989). It was on these grounds that the North Carolina Industrial Commission denied the Petitioner's claim. Consequently, the Petitioner's claim is barred by his failure to properly name the alleged negligent state agency and employee. Regardless of the federal preemption issue, he cannot recover on his state tort claim under N.C. Gen. Stat. §62-242.

CONCLUSION

The North Carolina Court of Appeals and the North Carolina Supreme Court decisions were based on over 70 years of settled federal law on the issue of FELA preemption of state law claims. Even were the Court inclined to adopt the Petitioner's reasoning, the Petitioner's claim would be barred under the provisions of the North Carolina Tort Claims Act. Accordingly, the Petition for *Writ of Certiorari* should be denied.

Respectfully submitted this the 3rd day of September, 1991.

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